No. 78574-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COWLES PUBLISHING COMPANY, a Washington corporation,

Petitioner,

v.

CODY SOTER, a minor child; FRANCIS SOTER and GLENDA CARR, individually, and as parents of CODY SOTER; THE ESTATE OF NATHAN WALTERS, a deceased minor child; RICK WALTERS and TERESA WALTERS, deceased minor child; and SPOKANE SCHOOL DISTRICT NO. 81, a Washington municipal corporation,

Respondents.

PETITIONER COWLES PUBLISHING COMPANY'S ANSWER TO *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Cowles Publishing Company, publisher of *The Spokesman-Review* newspaper (hereinafter "*The Spokesman-Review*"), hereby responds to the brief filed by *amicus curiae* Washington State Association of Municipal Attorneys ("WSAMA"). *Amicus* WSAMA raises certain arguments identical to those asserted by *Amici* Washington Schools Risk Management Pool, the Washington Association of School Administrators, the Southwest Washington Risk Management Insurance Cooperative, the Washington Council of School Attorneys, the Washington Counties Risk Pool, the Association of Washington Cities, the Association of Washington Cities Risk Management Service Agency, the Washington Cities Insurance Authority, the Water & Sewer Risk Management Pool, the Public Utility Risk Management Services Self Insurance Fund, and the Washington Governmental Entity Pool (collectively "WSRMP *et. al.*"). *The Spokesman-Review* herein responds to those issues raised by both WSAMA and WSRMP *et. al.*, namely, the proper application of the work product exemption of the Public Records Act to the case at bar.

At its core, *Amici*'s argument fails to appreciate the context in which this public records case arose. Specifically, other than a settlement agreement in which the District agreed to pay to Nathan Walters' parents

the sum of $980,000,[1] and a written press release concerning the same, not a single page of accessible public records exists concerning the facts known to the District related to the death of a ten-year-old child while on a school-sponsored field trip. While the District apparently has records available for public review relating to other insignificant accidents and minor injuries suffered by other schoolchildren on school premises or during school activities, no records are available for public review with regard to one of the most significant events that has ever occurred on the District's watch – the death of a child. These types of events are precisely those in which the public has the highest obligation to inform itself about the actions of its public servants.

II. ARGUMENT

A. *THE SPOKESMAN-REVIEW* IS NOT SEEKING ACCESS TO THE OPINIONS OF COUNSEL TO THE DISTRICT.

Throughout this litigation, *The Spokesman-Review* has made clear that it is not seeking access to specific communications between the District's outside counsel and the District relating to recommendations or opinions on liability issues concerning the death of Nathan Walters. (*E.g.*, Reply Brief, pp. 6-7.) *The Spokesman-Review* reiterates that, to the extent the records in question contain opinions, conclusions or legal theories of

[1] The settlement agreement was only released through this litigation. CP 137-38.

lawyers, those materials should be deleted and redacted from the facts contained in the documents relating to the death of Nathan Walters, pursuant to RCW 42.56.210(1), and recognizes that such materials are protected under the work product doctrine. *See, e.g., Limstrom v. Ladenburg*, 136 Wn.2d 595 (1998).

Thus, contrary to *Amici*'s allegations, disclosure of the requested material will not allow the public a window into the privileged legal opinions and theories of the counsel for public agencies. As discussed below, the Public Records Act incorporates the "substantial need" prong of the work product rule, and the facts of this case require application thereof to ensure that the work product exemption does not swallow the rule of open access to public records.

B. THERE IS NO *PER SE* EXEMPTION FOR WORK PRODUCT IN THE PUBLIC RECORDS ACT, AND A REQUESTOR IS NOT REQUIRED TO DUPLICATE THE AGENCY'S EFFORTS TO OBTAIN INFORMATION CONTAINED IN PUBLIC RECORDS.

1. This Court Has Recognized That A Substantial Need For Disclosure Of Agency Work Product Arises In The Public Records Context When The Information Is Unavailable From Another Public Source.

Amici argue that there is basically a *per se* exemption for work product under the Public Records Act; stated differently, *Amici* suggest that, if public records are deemed to be work product, then in no event will this work product be released to the public because the requesting party

can never demonstrate, under the standard set forth in Civil Rule 26(b)(4), that it has a "substantial need" for the records and the information contained in the records cannot be obtained elsewhere without undue hardship. The case law addressing the work product exemption contravenes this interpretation. Moreover, assuming, for the sake of argument, that the work product portion of the public records in question – *i.e.*, those portions of the record consisting of "mental impressions, conclusions, opinions, or legal theories of an attorney" – cannot be segregated from the factual portions of the records, this is precisely the type of case where work product should be made available.

The Public Records Act does not provide for a *per se* exemption for work product, but rather indicates that work product can be made available to a requesting party in certain circumstances. The Act exempts "public records which are relevant to a controversy and which are the work product of an agency's attorney" and would not be available to another party under civil litigation rules. RCW 42.56.290. This Court noted that the rules of civil discovery apply to determine "the parameters for the work product rule for purposes of applying the exemption." *Limstrom*, 136 Wn.2d at 605. Under CR 26(b)(4), a party may obtain

discovery of work product upon a showing of "substantial need" and inability to obtain the material elsewhere.[2]

In a public records case, the key factor in determining whether work product shall be disclosed is, as the court described in *Limstrom,* whether the information contained in the record may be obtained from elsewhere. In the *Limstrom* case, for instance, the Court denied access to public records that were deemed to be work product based on the rationale that the requesting party had already obtained the same records from another public agency. 136 Wn.2d at 614.

Here, however, the "substantial need" for disclosure arises from the fact that the information contained in the records in question is not available from any other public record source and that the District publicly stated that the information that was reported by the media was "inaccurate or incomplete". CP 205. As discussed below, while the policies and procedures of the District specifically provide that the District was to assemble a variety of records concerning the Nathan Walters incident, including witness statements, the District made the decision not to assemble these records. Therefore, the factual information that would normally have been set out in these District-mandated forms is contained

[2] *The Spokesman-Review* notes that, looking at this issue from the fiction of a putative party opposing the District (here, the Walters family), that party would have been able to gather the factual information sought in this action through discovery.

only in the factual statements assembled by the investigator that the District said would perform an "objective" review of the circumstances in the District's actions concerning the Nathan Walters incident. Further, there are no records at any other public agency, no court records, no discovery documents, and no written documents from the mediation proceedings between the District and the Walters family. The District's outside counsel further instructed District employees not to speak to the public or media about the event. Finally, the public (and, even more so, the media) have an interest in the accuracy of the reports of the slivers of information made available to the public about this event.

2. A Requestor Is Not Required To Duplicate Agency Efforts To Obtain Information Contained In Public Records.

Amici appear to argue that a requestor seeking factual information containing public records that the agency designates as "work product" should be required to interview witnesses to discover the information. That certainly does not comport with the rationale behind the Public Records Act that information about government and the conduct of public officials and employees should be made accessible to the public upon request.

Specifically, *Amici* insinuate that *The Spokesman-Review*, a member of the media, with admitted resources, should be required to

basically duplicate what may be in the requested public records by conducting its own investigation of the Nathan Walters incident. As an initial matter, what is contained in the public record cannot be duplicated; facts that may asserted in the public records could change based on recollections of witnesses, and a separate independent investigation may never reveal what was known by the District at the time of the event.

However, more importantly, the Public Records Act prohibits an agency from responding to a public records request based on the identity or motives of the particular requesting party. "Agencies shall not distinguish among persons requesting records." RCW 42.56.080. In other words, the public records statute does not provide for lesser or greater rights to any member of the public in making a request for access to public records, and to require investigative efforts to duplicate public records on the basis of the resources of the requesting party would be violative of this policy as expressed in the statute. *The Spokesman-Review* submits that *Amici* would not ask a private citizen who is not a media member to spend his or her time and resources in this way, and notes that, throughout this litigation, the District, in support of its decision to deny access, has emphasized repeatedly that *The Spokesman-Review* is a newspaper. (*See* Reply Br., pp. 2-5.)

C. THE FACTS OF THE CASE AT BAR DEMONSTRATE WHY THE LEGISLATURE AND THIS COURT RECOGNIZE A "SUBSTANTIAL NEED" EXCEPTION TO THE WORK PRODUCT RULE.

1. The District Failed To Follow Its Own Policies, Which Would Have Required The Creation Of Certain Publicly Available Records, And District Personnel Were Kept From Public Comment.

Prior to the death of Nathan Walters, the District had adopted a specific set of policies and procedures that require District personnel to investigate injuries to students. CP 249-53. The various materials required to be assembled by the policies and procedures are witness statements and various reports to comprise a factual scenario as to the accident in question. CP 249-53. Despite this explicit policy, the District assembled only an incident report, which contains, by the District's own admission, minimal information. CP 178. However, the very same information that would have been contained in these records is also contained in the factual portions of the records to which access is sought because the District's counsel and outside investigator undertook essentially the same process required by the District's policies and procedures regarding injuries to students. CP 223-37.[3]

[3] The overreaching nature of the District's claim of work product protection is clear by the nature of the records which it seeks to withhold from public view. The records at issue include items such as notes prepared by District employees, notes written by a field trip chaperone, photographs of the site of the field trip, a farm open to the public, taken by the investigator days after the incident, and a map of the farm. C.P. 223-237.

Four days after the death of Nathan Walters, the District, through its superintendent, told the public that an investigator had been hired by the District to perform an "objective" investigation that would indicate whether the District had acted appropriately concerning events surrounding the death of Nathan Walters. CP 309-12. Despite this public announcement, however, all documents, including witness statements, that the investigator assembled were maintained not by the District but by the District's outside counsel. CP 207. In addition, the District's Community Relations director was instructed not to discuss the matter and to refer all questions to the District's outside counsel. CP 303, ¶ 18.

2. No Publicly Available Court Records Exist, Nor Do Any Factual Documents That Would Have Been Created Through Litigation And Been Available To The Public.

No litigation was ever initiated concerning this matter. In fact, no written complaint by the parents of Nathan Walters was ever filed with the District. No complaint was filed in court and no court hearings were held. Since no litigation was filed, no discovery was ever undertaken. There are no answers to interrogatories in which the District was required to respond to factual questions concerning Nathan Walters' death and no depositions of District personnel. There are no court records concerning the death of Nathan Walters.

No investigation by any agency, other than as reflected in the records in question, was undertaken. There are no records compiled by the Department of Social and Health Services or the police department concerning the death of Nathan Walters.

The mediation that occurred that resulted in the District paying $980,000 to the parents of Nathan Walters was confidential. All materials that were submitted as part of the mediation were, by agreement of the parties, submitted confidentially. CP 4-1-02, 447-49. The District refused to even release the final settlement agreement in this matter until ordered by the Court to do so. CP 137-38, 761-67.

3. The District Has Itself Chosen To Release Selected Pieces Of Information That Can Only Come From The Records It Claims Are Protected Work Product.

Although the District has refused to release any of the factual information assembled by its lawyers, it has made self-serving statements through press releases concerning sparse information about the incident, but information which can only have been learned from the investigation conducted by the private investigator and orchestrated by outside counsel. CP 309-10. This information was apparently also disclosed to the Walters family, an adversary in mediation, a fact revealed for the first time in the District's appellate briefing. (Response Br., p. 57.) The District further

has, throughout this litigation, exhaustively detailed its actions in various pleadings, including legal theories and defenses considered and discussed with the District. (*See* Respondent's Br., pp. 5-27.) In other words, the District has stressed that the only information assembled in this matter was assembled through its counsel and that such information is indelibly imbued with its counsel's legal opinions. Nevertheless, the District has picked and chosen what of this information it has made available to the public, and purposely revealed the tenor and content of its communications with counsel in an attempt to convince this Court and the lower courts that its counsel truly feared a lawsuit so as to render those communications privileged, while all the time arguing that this release of information did not constitute a waiver of the work product protection.

When faced with the request for public records from *The Spokesman-Review*, the District drafted a complaint in which it sought to enjoin itself from releasing the records in question. CP 3-19. While the lawsuit also included as Plaintiffs the parents of Nathan Walters and the parents of another child who had been injured in an accident on District premises (the Soters), the parents of the children have never actively litigated this case. The Soters were dismissed from the lawsuit after the settlement agreement concerning the Soters' claim against the District was

released. Nathan Walters' father voluntarily withdrew from the lawsuit, and his mother has never participated in filing any pleadings concerning this matter. To be clear, this litigation, from its start in 2001 through the present, has been directed, controlled, and pursued by the District.

4. *Amici* Confirm That Agencies Will Utilize The Ruling Made By Division III To Justify Withholding Information From The Public About The Most High Profile Incidents By Cloaking Such Records With Counsel's Input.

As evidenced by the number of *Amici* who have weighed in on the part of the District, nearly every public agency in Washington that in any fashion deals with accidents relating to public agencies sides with the District, sanctioning what the District did in this particular case. In other words, these agencies are telling the Court that, despite representations to the public made by an agency concerning performance of an "objective" review, despite policies and procedures that provide for the assembling of records that should be available for public inspection, and despite selected information being released by an agency that, by its own admission, came only from the investigation, no factual information contained in public records that have been assembled by agents of the District should ever be made available for public inspection. To be clear, these agencies are asking the Court to adopt a "just trust us" approach. As discussed below, the Public Records Act requires otherwise.

The specter of how the Court of Appeals' ruling may affect the release of information to the public in the future is frightening to say the least. While information concerning minor incidents involving public agencies in which counsel is not retained may be made available, information about incidents that are of the most public import and interest – such as the death of a ten year-old child on a school-sponsored trip – will not.

What the District has done in this case is use its lawyers to undertake the very investigation that its policies and procedures said the District would undertake. The facts that should be contained in those District-mandated forms and policies are memorialized, but have been assembled only on different paper forms which, if *Amici* prevail, will be forever shielded from public view, despite that there is no remaining possibility of a claim against the District related to Nathan Walters' death. The result of sanctioning this approach, apparently favored by hundreds of public agencies throughout the State, will be that agencies, with impunity, in the event of a significant and high-profile issue, will be able to immediately retain counsel, ignore their own procedures as to assembling of records that would generally be available for public inspection, release information piecemeal assembled during the investigation (deciding what

the agency thinks the public should know and not know), and proceed to resolve issues in a confidential setting so that no records (and the factual information contained therein) will be available for public inspection.

This scenario runs directly contrary to the purpose and intent of the public records statute, which is to keep the citizens of the state of Washington informed about the actions and activities of its public agencies and public servants, and to prohibit those public agencies and public servants from making the determination about what they want to feed to the public about their actions and conduct. RCW 42.56.030. The Court should reject this attempt to create a work product exemption broader than that contemplated by *Limstrom* and CR 26(b)(4). The alternative is to allow public agencies to hide the information that most needs public airing – that related to tragedies that occur on the watch of public agencies, such as the death of Nathan Walters.

III. CONCLUSION

For the reasons set forth above and those detailed in its earlier briefing, *The Spokesman-Review* requests that the Court of Appeals be reversed and an Order be entered requiring the Spokane School District No. 81 to make available for public inspection the requested documents.

RESPECTFULLY SUBMITTED this 2nd day of March, 2007.

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FILED AS ATTACHMENT
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CERTIFICATE OF SERVICE

On the 2nd day of March, 2007, I served the within document on all interested parties to this action by e-mail and as follows:

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